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Veröffentlichungsversion / Published Version
Stellungnahme / comment

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:
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Empfohlene Zitierung / Suggested Citation:

Richter, W. (2020). *Attack on the Open Skies Treaty: president Trump wants to withdraw from the Open Skies Treaty*. (SWP Comment, 29/2020). Berlin: Stiftung Wissenschaft und Politik -SWP- Deutsches Institut für Internationale Politik und Sicherheit. <https://doi.org/10.18449/2020C29>

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Leibniz-Gemeinschaft

SWP Comment

NO. 29 JUNE 2020

Attack on the Open Skies Treaty

President Trump Wants to Withdraw from the Open Skies Treaty

Wolfgang Richter

President Donald Trump has announced that the United States will leave the multi-lateral *Open Skies Treaty* (OST). Russia could soon follow. The Trump administration would thus continue the US withdrawal from cooperative security and destroy another piece of the arms control architecture. Its continued dismantling, a new arms race, and the return of armed conflict and nuclear warfare scenarios threaten Europe's security and strategic stability. The OST permits cooperative observation flights over the territories of the States Parties. This allows for maintaining a minimum of military transparency and confidence-building, even in times of crisis. Such observation flights cannot be replaced by national satellite reconnaissance, especially since it is only available to a few states. Having the option to conduct independent observations is particularly important for allies in regions of tension. Germany and European partners must make a strong commitment to maintaining the OST.

In October 2019, President Trump publicly announced his intention to terminate US participation in the *Open Skies Treaty*. NATO was officially informed of this position in November. On May 22, 2020, the US State Department gave notice on the intent to withdraw from the OST. US Defense Minister Mark Esper and Secretary of State Mike Pompeo stated that the United States can no longer accept Russia not implementing the treaty adequately, as it has unlawfully restricted observation flight distances over the Kaliningrad exclave and established a 10-kilometer-wide strip on Georgia's disputed borders that cannot be overflown. The reason is the conflict over Abkhazia and South Ossetia.

Although NATO allies share these concerns, only Georgia has stated that this constituted a substantial breach of the treaty. In 2012 Tbilisi therefore unilaterally suspended the OST with regard to Russia. In response to unilateral Russian action, the United States has applied more severe restrictions on Open Skies (OS) flights by Russia over Alaska and the Pacific Islands since 2017. However, it did not claim material breach and, therefore, did not suspend the treaty when it gave notice of the intent to withdraw. Republican senators have long suspected that Russia is using OS observation flights over the United States for "espionage." According to the State Department, Russia had "weaponized" the



treaty against US interests; therefore, it no longer had any strategic value. Moreover, the United States could achieve better observation results with satellites.

A statement in favor of maintaining the OST was issued by Germany, France, and nine other European states on May 22, 2020. On the same day, the NATO Council meeting demonstrated that European allies would not simply follow the United States in withdrawing, and that such an action has the potential to divide the alliance. This impression was reinforced when the Bundestag, with unanimous support from all factions, posted a letter to the US Senate and the House of Representatives calling for the US government to remain in the treaty.

Purpose and Rules of the Open Skies Treaty

The OST permits cooperative observation flights over the territories of the States Parties in the OSCE area between Vancouver and Vladivostok. It offers transparency of military activities, even in times of crisis, and provides for additional verification of arms control agreements. In this way, it contributes — also through direct military contacts — to confidence-building and a realistic assessment of situations.

The treaty was signed in 1992 and was applied provisionally for 10 years. It entered into force in 2002, when 26 of the 27 signatory states had completed their ratification procedures, including Russia after Vladimir Putin became president. The current 34 States Parties include almost all NATO states (except Albania, Montenegro, and North Macedonia), the EU states Finland and Sweden, as well as Russia, Belarus, Ukraine, Bosnia-Herzegovina, and Georgia.

The number of permitted observation flights is based on a quota system that takes into account the size of states. For the United States and Russia, which is part of a treaty union with Belarus, the treaty allows for 42 observation flights each per calendar year; for Germany, France, the United Kingdom, Italy, Canada, Ukraine, and Turkey, it is 12

each. For the remaining states, graduated quotas apply, down to only two flights for smaller states, such as Portugal.

No State Party may conduct more observation flights than its “passive” quota allows for others to fly over its territory. In addition, each State Party shall use only 50 percent of its active quota for flights over another State Party. Therefore, the United States and Russia may each use a maximum of 21 observation flights per year for mutual overflights. Nevertheless, the passive quota of 42 flights over Russia can be fully utilized, as it is regularly crossed by aircraft of NATO partners as well as Finland, Sweden, and Ukraine. In contrast, there are far fewer OS flights over the United States, as allies do not verify each other.

The OST allows the use of certain sensors for observation flights that must not exceed a defined image resolution from a range of flight altitudes. A resolution of up to 30 cm is permitted for analog and digital optical panoramic and framing cameras as well as video cameras with real-time displays. This corresponds to the resolution of the best commercial satellite images. The certification of digital cameras has begun. For the future, the treaty also provides for night-vision-capable infrared line-scanning devices with a resolution of 50 cm and sideways-looking radar systems (*Synthetic Aperture Radar*) with a resolution of three meters. Such systems have not yet been introduced, however.

Not all States Parties have their own OS observation aircraft or sensors. In the so-called *Pod Group*, nine states share the use of aerial camera equipment. In addition, the treaty permits the use of aircraft of third states or of the observed state that have been certified for observation flights. Germany had to make use of these options after the crash of its national OS aircraft in 1997.

A new German OS aircraft (*Airbus 319*) was procured in 2017 and is planned to be operational by mid-2021. This will give Germany more flexibility in the event of a crisis to organize observation flights quickly and without lengthy coordination with partners. Nevertheless, the offer of coopera-

tion with other interested states will be retained, be it by renting the German aircraft or by the proven flight-sharing and the invitation of “guest observers.”

OS observation flights are launched on short notice. The observing state must notify the observed state of the intent to do so at least 72 hours in advance. However, it will be informed of the selected flight route only after the observers have arrived in the observed state at the agreed point of entry.

Once the route has been announced, a coordination process takes place, which may take no longer than eight hours. The observed state may change the planned route only in case of *force majeure* or unavoidable flight safety requirements.

Twenty-four hours after the submission of the flight plan, the observation flight may commence, and it must be completed no later than 96 hours thereafter. This limits the ability of the observed state to organize significant changes on the ground, such as major troop movements.

OS observation flights are, therefore, also more flexible than satellites, whose energy reserves are limited and allow only for a few changes in their defined orbits. In contrast, OS flights can be carried out on short notice with an appropriate flight route over an area selected by the observing state in accordance with situational requirements. Furthermore, observation flights in the agreed altitude range are also possible below cloud cover, which hinders optical satellite observation.

Transparency Is Not Espionage

In November 2019, a senior official of the Trump administration declared that Russia was using the OST for espionage. Allegedly, a Russian observation flight in 2017 flew over Washington and illegally observed critical military and political infrastructure. This seemed to confirm earlier allegations by Republican senators.

But the accusation of espionage goes nowhere. Observation flights are not only cooperatively agreed, but are also conducted

together. Escort teams of the observed state are always on board together with observers. They monitor that the provisions of the treaty are abided by. OS aircraft, cameras, and sensors are only allowed if they have been certified by the States Parties and checked by the escort team prior to the flights.

The resolution of the sensors is sufficient to differentiate between missile types, battle tanks, armored infantry fighting vehicles, other armored combat vehicles, artillery systems, aircraft, and helicopters. However, sensitive information about radio and radar emissions or the software of target acquisition and guidance systems cannot be detected.

In addition to the states participating in an observation flight, all other States Parties also receive the mission report. On request, they can purchase the image sequences obtained during the flights. In this way, the results of the observation flights are shared with 34 states, and the findings on military activities and the implementation of arms control agreements are multilateralized. Certainly, this information should also be given more attention in the discussions on risk reduction in the OSCE Forum for Security Co-operation in Vienna. In contrast to the exchange of data gained through national intelligence, findings from OS observation flights are not subject to prior political selection and evaluation. The fact that the data are jointly collected — so that their authenticity cannot be disputed — is one of the most important advantages of the treaty.

The accusation of espionage is a relapse into the language of the Cold War. At that time, it was the West that had to convince the Soviet Union of the confidence-building effect of military transparency. This view is now common wisdom in Europe and forms the basis of all arms control agreements.

Proven Treaty Implementation

Since the entry into force of the OST, States Parties have undertaken more than 1,500

observation flights, of which about 500 were over Russia and Belarus, involving the participation of about 200 US missions. In contrast, Russia only conducted about 70 flights over the United States between 2002 and 2016, and it has used the bulk of its flight quotas for European countries. From this fact, unilateral advantages of Russia over the United States cannot be deduced.

In general, the observation flights were carried out without major problems. They made a significant contribution to obtaining objective information on the situations in the areas observed. In connection with the Ukrainian crisis and the military-political tensions in the Baltic-Russian border region, Western states have intensified their observation flights regionally. Between March and July 2014 alone, they made 22 flights over western Russia and Ukraine. In December 2018, following the escalation in the Kerch Strait, a special observation mission was flown with the consent of all parties involved to assess the situation in the area of tension.

However, political tensions have put a strain on the annual coordination of the distribution of flight quotas in the Open Skies Consultative Commission (OSCC) and sometimes prevented agreement. Due to the Russian-Georgian territorial conflict, no observation flights were possible in 2018. A Greek-Turkish dispute over Cyprus' accession to the treaty has repeatedly called into question the consensual adoption of the OSCC agenda since its entry into force. In early 2016, Ankara refused a Russian observation flight in the Turkish border area with Syria. For a long time in 2013 and in September 2018, the United States delayed the certification of Russian digital cameras. In September 2019, Russia rejected a segment of a planned US-Canadian observation flight over an area in central Siberia where the large-scale exercise *Tsentr* was taking place. In addition, the United States has been restricting Russian flights over Alaska and the Pacific Islands since 2017.

However, it was also possible to settle contentious issues amicably. For example, Russia lifted the minimum flight altitude

over Chechnya in 2016. In general, the agreement has been implemented in accordance with its provisions since 2002.

Georgian-Russian Conflict

In 2012, Georgia suspended the OST with regard to Russia and did not allow any more Russian observation flights. Moscow had recognized Georgia's breakaway territories of Abkhazia and South Ossetia as independent states in 2008 and, since 2010, has applied the treaty rule of keeping a distance of 10 km from the border of non-States Parties for OS observation flights. This was also met with criticism from Western states. But it was not until autumn 2017 that the coordination of quotas for the following year failed when Moscow was no longer willing to accept the blockade of Russian observation flights over Georgia. As a result, no observation flights took place in 2018 — with the exception of the Kerch mission.

Flights could only be resumed when Moscow made concessions in the coordination of flight quotas for 2019. But this does not solve the problem. Since Washington is not interested in a solution and Moscow is also showing little initiative, the role of mediator would probably remain with the Europeans, and especially Germany, since the flight quotas are coordinated under German chairmanship.

The conflict could be solved pragmatically if Moscow sticks to its recent policy of *de facto* non-application of the distance zone and Western states signal that they are not planning any flights in this zone. Given the range capabilities of the sensors, the 10 km zone is of little importance for the acquisition of information.

A compromise would be conceivable if Tbilisi and Moscow renounced maximum positions, a Western state like Germany allowed Russian guest observers to participate in a national mission over Georgia, and Tbilisi did not prevent this. At the same time, it would have to be made clear that compromise solutions would be "status-

neutral,” i.e., would not affect the basic positions of the States Parties with regard to (non-)recognition of the independence of Abkhazia and South Ossetia.

Flight Limitation over Kaliningrad

The Russian limitation of air routes over the Kaliningrad exclave could also be ended pragmatically. The reason for the restriction was a Polish OS flight in 2014 that lasted several hours over this small area of only 15,000 km². Therefore, the local airspace had to be closed for other flights. In doing so, Poland made full use of the treaty rules, which allow a maximum flight distance of 5,000 km for the whole of western Russia from the Kubinka OS airfield. For Kaliningrad, the treaty does not provide for a separate flight distance limitation. In order to avoid repetition, Russia then declared a specific route limit of 500 km for flights over this area that were to be started at Kaliningrad airport.

In principle, the OST takes into account the size of the overflown areas when determining maximum flight distances. For example, there are limits of 250 km over the Danish Faroe Islands, 600 km over the Czech Republic, 1,200 km over Germany, 3,000 km over Alaska, and 6,500 km over the Asian part of Russia.

The unilateral Russian flight distance limitation over Kaliningrad does not prevent the purpose of the treaty from being fulfilled, as observation flights over the exclave remain possible to a sufficient extent. Accordingly, there is no essential restriction on the implementation of the treaty (*material breach*). However, the OST does not permit unilateral rule changes. All modifications of its provisions must be agreed upon cooperatively.

This can be prepared through consultations in the OSCC and negotiated in the forthcoming OST review conference. Due to the corona crisis, it will probably not take place until autumn 2020. Given the disinterest of Washington and Moscow’s passivity, the task of mediation would prob-

ably fall back to the Europeans, especially to Germany and France. In the United Kingdom — despite criticism from British experts of Trump’s course — the longer-term strategic interest in not positioning itself against the United States could prevail.

A compromise could be to allow a new OS airfield in Kaliningrad and to agree on a flight route limitation that may deviate slightly from the unilateral Russian determination, but which does not overburden local airspace. Alternatively, St. Petersburg could be brought into play as the location of a new OS airfield with an appropriate flight path limitation, which Moscow itself could propose.

Justification of the US Withdrawal from the Open Skies Treaty

Washington has reacted to Russia’s limiting of the route over Kaliningrad by limiting Russian flights over and from Alaska, to such an extent that Russia’s planes can no longer fly over Hawaii and other Pacific Islands. The situation has not worsened so far. There is therefore no discernible reason for withdrawal from the treaty. Rather, it appears to be a fundamental decision by the Trump administration, which once again is expressing its growing distrust of multilateral agreements.

The US representative informed NATO partners in Brussels of the intent to withdraw from the treaty in mid-November 2019 and May 2020. In the Republican camp of the Senate, there are voices that have long been campaigning for withdrawal, among them Senators Ted Cruz and Tom Cotton, in particular. At the end of October 2019, they tabled a Senate resolution with the aim of withdrawing from the treaty. Behind it are arguments claiming that the treaty was of strategic disadvantage to the United States, and that Russian espionage posed a threat to national security. Secretary of State Pompeo took up these allegations by stating that Russia had “weaponized” the treaty against US security interests.

Both allegations are without factual basis. Since 2002, the United States has undertaken three times as many observation flights over Russia as Russia has conducted over the United States. In 2019, there were 18 US flights over Russia and seven Russian flights over the United States. According to the OSCC quota distribution, the number of Russian flights will remain the same in 2020, while the United States planned to use the maximum quota of 21 flights over Russia. This plan, however, was cancelled on the day that the US withdrawal notification was sent out.

If Russia wants to undertake observation flights over US territory, it must give 72 hours of advance notice; the routes must be agreed upon and approved. Whether the sensors used are permissible is confirmed by a certification process in which US experts play a major role. Before the flights, US inspectors check the sensors of the Russian OS aircraft. During the flights, there are always US escort teams on board to ensure that the treaty rules and the agreed flight profiles and use of sensors are observed.

The argument that OS images are qualitatively inferior to national satellite images is not valid either, since it is irrelevant for the purposes of the OST. It aims at cooperatively gained information, the factual basis of which cannot be disputed or manipulated in the political discussion, and which thus contributes to confidence-building. Above all, this argument ignores the interests of those States Parties that do not have national satellite reconnaissance and, particularly in regions of tension and conflict, rely on independent and objective information.

Date of US Withdrawal from the OS Treaty

The OST was concluded for an unlimited period of time, but the United States can withdraw from it at any time by issuing a respective notification to the depositary states Canada and Hungary as well as all other States Parties. Although the United States is not obliged to give reasons for such

a withdrawal, it has argued that further implementation of the treaty was no longer compatible with essential national security interests, and it pointed out that Russia is not implementing the treaty adequately.

After receiving the withdrawal notification, the depositary states must convene an extraordinary conference of States Parties within 30 to 60 days. This conference is scheduled to take place on July 6, 2020. Conference attendees will discuss the consequences of the withdrawal of the United States from the treaty, which will take effect six months after the withdrawal notification, i.e., on November 21, 2020.

However, the Vienna Convention on the Law of Treaties allows for the suspension of the implementation of the treaty before the end of the period of notice. This would require a serious breach of the treaty that would no longer allow the purpose of the treaty to be fulfilled. The United States therefore suspended the implementation of the Treaty on Intermediate and Shorter-Range Nuclear Forces on the day it gave notice of withdrawal. In regard to the OST, Washington did not take such an approach, as it was difficult to prove that the fulfillment of the treaty's objectives had been seriously impaired. It only announced that it would terminate all of its own flights. This will also affect partner countries with whom the United States planned to share observation flights.

However, when the United States can give notice of withdrawal also depends on the complex rules of the US Constitution. They are disputed between the White House and Congress. What is clear is that any US commitment to a treaty under international law only comes into effect once the Senate has ratified it. The rules for the withdrawal of the United States from such treaties are far less precise. Traditionally, the president claims this right for himself, whereas Congress insists on its participation in such a decision. The Democratic Chairman of the Foreign Affairs Committee of the US House of Representatives, Eliot L. Engel, already warned against a withdrawal from the OST in October 2019 in a

letter to the president's Security Advisor, Robert C. O'Brien.

Engel has recently accused the administration of having violated the conditions contained in the *National Defense Authorization Act for Fiscal Year 2020*. In its summary report on the act, the Senate, in December 2019, called on the president to issue a 120-day advance notice to Congress before formally notifying the depositary states of the US withdrawal from the treaty. The act required the president to consult allies and explain in a report the reasons for a US withdrawal from the treaty and demonstrate the disadvantages for national security if the United States were to remain in it.

However, irrespective of ongoing national discussions between the US government and Congress, it is the State Department's withdrawal notification of May 22, 2020, that determines the international schedule. The notice period will expire on November 21, 2020, and thus, the United States will withdraw from the OST well within the term of the current president.

Consequences of the US Withdrawal from the OS Treaty

The US withdrawal from the treaty does not mean that it would be generally terminated. Rather, the question arises as to how the other 33 States Parties will react. This will be discussed during the upcoming extraordinary conference of States Parties, which will be convened on July 6, 2020. Apart from organizational questions, such as adapting the distribution of observation flight quotas, more general questions have to be evaluated, such as the future purpose and operation of the treaty, and which national conclusions States Parties will draw from the US decision.

In particular, Russia would then have to decide whether to continue implementing the treaty in relation to the European states and Canada. The fact that Russia has undertaken far more observation flights over European states than over the United States could indicate that it wishes to continue

such flights. After all, it could gain insights into the movements of NATO troops, including US forces, which are temporarily or permanently stationed in Europe. On the other hand, Russia would lose the possibility of continuing aerial observation of the core territory of the United States. This is important both for reasons of political status and for the verification of US strategic nuclear arsenals.

As allies regularly exchange intelligence findings among themselves, Moscow will probably also rightly suspect that Western States Parties will pass on to the United States the information gained from observation flights over Russia, although this is prohibited by the OST vis-à-vis non-States Parties. The question is whether this would be so serious an issue. Russia, too, is likely to receive covert information from its allies Belarus, Kazakhstan, and Armenia on the implementation of the Treaty on Conventional Armed Force in Europe, despite the fact that it suspended the treaty at the end of 2007.

Weighing up these arguments, Moscow might give priority to the principle of political equality of status with Washington. Therefore, the possibility cannot be excluded that Moscow will also withdraw from the OST if Washington does.

If this were to happen, the remaining 32 States Parties could decide to maintain and further implement the treaty for reasons of principle. However, it would remain open as to what operational purpose they would pursue once the most important partners had left the treaty. Since allies, as a matter of principle, do not verify each other, Western OS observation flights would be limited to Ukraine, Belarus, Georgia, and Bosnia-Herzegovina. The "neutral" EU states Finland and Sweden could be added in order to exploit more flight quotas.

Conclusions and Recommendations

If Washington terminates the OST, this could trigger a chain reaction that would

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ISSN 1861-1761
doi: 10.18449/2020C29

(Updated English version of
SWP-Aktuell 38/2020)

destroy another piece of the rules-based European security order and arms control architecture. The few remaining instruments for de-escalation and confidence-building in relations with Russia would be further dismantled, and European security would suffer additional damage. It is in Europe's interest to prevent this. Time is pressing.

Germany and France have demonstrated their special responsibility for saving the OST by organizing a strong declaration of 11 European states. They should rally support also from other European states, in particular from a "group of like-minded states" that intends to renew conventional arms control in Europe.

In addition, Germany and European allies should throw their weight in Washington at the highest political level in order to preserve the OST. In doing so, they should appeal to the US to demonstrate solidarity with its allies and recall that independent options for objective intelligence gathering are of great political importance, especially for the security of Eastern allies.

Together with European allies, they should now take the initiative in the OSCC to resolve the problems of the flight distance limitation over Kaliningrad and the 10 km distance zone to Georgia's disputed borders. The compromise options outlined above could form the basis for agreeing on a solution to the implementation problems at the forthcoming extraordinary and review conferences.

Furthermore, members of the Bundestag should follow up on their letter to the US Congress and stay in close contact to promote action for the US government to remain in the OST.

Discussions with American officials and congressmen should express the European interest of keeping the OST with Russia. In addition, these talks should warn against the consequences of a US withdrawal. It must be made clear that the Europeans will not simply follow an American withdrawal from the treaty, and that the activities of

American troops stationed in Europe would continue to be subject to observation by Russian OS flights. It should also be remembered that, under the terms of the treaty, findings from European observation flights over Russia cannot be passed on to the United States.

To Moscow, Europeans should signal their interest in preserving the OST. It should be encouraged to agree to a compromise solution for the implementation problems over Kaliningrad and on the Georgian border. In view of Europe's security crisis, an appeal to the common interest to not further undermine stability would also be useful.

If the United States were to withdraw from the OST, it would be important to convince States Parties to continue implementing the treaty. This intention should also be made clear to Moscow. The Kremlin should be encouraged to adhere to the treaty as well in order to allow for a minimum of confidence-building in Europe in the future.

If Moscow reacts to a possible withdrawal of Washington by leaving the treaty, Europeans should nevertheless continue to implement it for reasons of principle. This would leave the option open for the United States and Russia to rejoin it if political circumstances change.

If the Open Skies Treaty is to be saved, now is the right time – and probably the last chance. Germany has a political and conceptual role to play in mediating and preserving the treaty as an instrument of military transparency and confidence-building.

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